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# Supreme Court of the United States

OCTOBER TERM, 1941

314 U.S. 633

No. 133

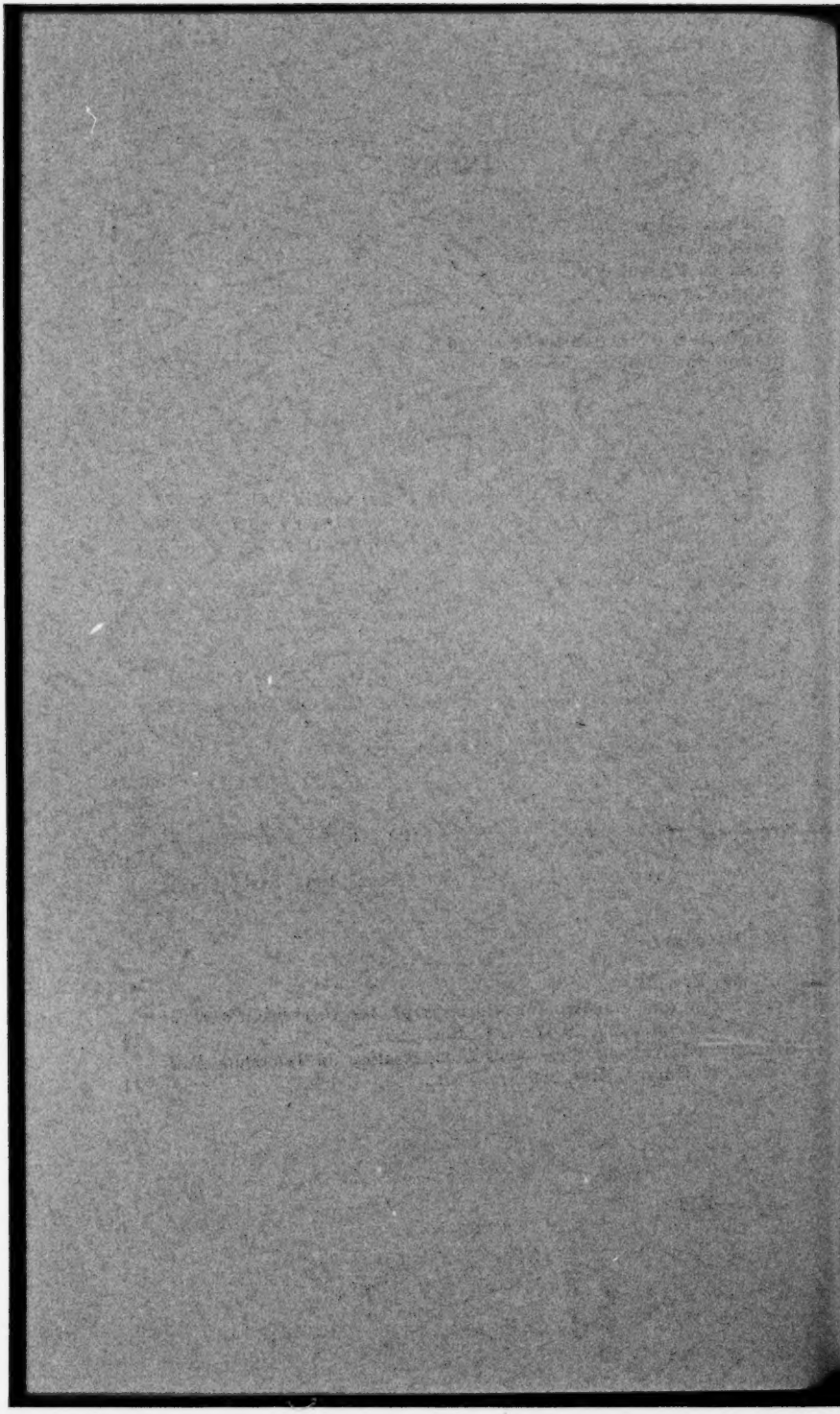
JOHN O. KROUSE, *Petitioner*,

*v.*

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

CHARLES A. HORSKY,
DANIEL L. BRENNER,
*Attorneys for Petitioner.*



# INDEX.


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes Involved | 2 |
| Statement | 3 |
| Specification of Errors to be Urged | 5 |
| Reasons for Granting the Writ | 6 |
| Conclusion | 14 |


## CITATIONS

**Cases:**


*Chicago, Burlington & Quincy Railroad* v. *Harrington*, 241 U. S. 177 7, 8
*Chicago & Eastern Illinois Railroad Co.* v. *Commission*, 284 U. S. 296 8
*Chicago & Northwestern Railway Co.* v. *Bolle*, 284 U. S. 74 8
*Commissioners* v. *Lucas*, 93 U. S. 108 2
*Illinois Central Railroad Company* v. *Behrens*, 233 U. S. 473 6
*Minneapolis & St. Louis Railroad Company* v. *Winters*, 242 U. S. 353 8
*Mower* v. *Fletcher*, 114 U. S. 127 2
*New York Central Railroad Co.* v. *Winfield*, 244 U. S. 147 12, 13, 14
*New York, New Haven & Hartford Railroad* v. *Bezue*, 284 U. S. 415 8
*Shanks* v. *Delaware, Lackawanna & Western Railroad Company*, 239 U. S. 556 7
*White* v. *Lehigh Valley R. Co.*, 251 App. Div. 507 8


**Statutes:**


Federal Employers' Liability Act, 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. A. Sec. 51 2, 10
Kansas Workmen's Compensation Act, Kans. Rev. Stat. (1935) Secs., 44-505, 44-506 3, 12


**Miscellaneous:**


42 Cong. Rec. 73 11
Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1931*, 49 Harv. L. Rev. 226 11
Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 Harv. L. Rev. 389 11

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kansas, entered January 25, 1941 (R. 73), rehearing denied March 14, 1941 (R. 97), reversing a judgment of the District Court of Wyandotte County, State of Kansas, in favor of the petitioner under the Kansas Workmen's Compensation Act, and remanding the case with directions to enter judgment for the respondents.

### OPINIONS BELOW

The opinion of the Supreme Court of Kansas (R. 74) is reported in 153 Kan. 181. The opinion of the Workmen's Compensation Commission (R. 31) is unreported.

## JURISDICTION

The judgment of the Supreme Court of Kansas was entered January 25, 1941 (R. 73). A petition for rehearing was denied March 14, 1931 (R. 97). The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended. The judgment of the Supreme Court of Kansas is a final judgment. *Commissioners* v. *Lucas*, 93 U. S. 108, 113; *Mower* v. *Fletcher*, 114 U. S. 127.

## QUESTIONS PRESENTED

At the time of his injury, the petitioner was tending a switch engine which had been taken to the roundhouse for inspection and which was withdrawn from switching service for a period of six hours. Two questions are presented:

(1) Was the petitioner, at the time of the injury, engaged in interstate commerce within the Federal Employers' Liability Act, and for that reason not within the jurisdiction of the Kansas Workmen's Compensation Commission?

(2) If the petitioner was engaged in interstate commerce, does the Federal Employers' Liability Act preclude the application of the Kansas Workmen's Compensation Act, and particularly in the absence of any allegation or proof of fault on the part of the respondents?

## STATUTES INVOLVED

The relevant portions of Section 1 of the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. A. Sec. 51, are as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in

> damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

The relevant portions of the Kansas Workmen's Compensation Act, Sec. 44-505, Kansas Gen. Stat. (1935) are as follows:

> "That this act shall apply only to employment in the course of the employers' trade or business in the following hazardous employments: Railway * * * and all employments wherein a process requiring the use of * * * inflammable materials is carried on, each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risk to the life and limb of the workmen engaged therein is inherent, necessary, or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for injuries to workmen. * * *"

## STATEMENT

The petitioner was employed by the respondents as an "engine herder". His duties consisted of tending to switch engines. He kept the fire going, the steam pressure up, the tanks and boilers supplied with water, and the engine oiled and cleaned until it was taken over by the operating crew (R. 8). On the morning of April 17, 1938, between eight and nine o'clock, the petitioner was seriously injured while performing these tasks on switch engine No. 301 in the terminal yards of the re-

spondents in Armourdale, Wyandotte County, Kansas (R. 8-9).

The switch engine had been in operation in the Armourdale yards from 3 p. m. April 16 until 7 p. m. April 17 (R. 24). It switched intrastate and interstate cars (R. 24). Having completed a sixteen-hour stretch, it was taken to the roundhouse for about 1½ hours for inspection, servicing and necessary repairs, and then to an outbound engine track next to a water crane (R. 9). It was customary to drive engines there and place them in charge of herders to await the operating crews (R. 25). At 1 p. m. the crew appeared and put the idle switch engine to work once more. It made up trains bound for both interstate and intrastate points (R. 27, 28, 71).

The respondents' trainmaster testified that the switch engine had been assigned to this task before it was removed from the roundhouse and placed on the outbound engine track. But there was nothing hard and fast about this assignment. He admitted, upon re-cross examination, that he did not know what particular cars the westbound trains would have for switching (R. 28). Thus it was not at all certain that the switch engine would move interstate cars. He further admitted that if something wrong had been discovered in switch engine No. 301, another of its class would have been assigned to this particular job (R. 69); that it was off duty for six hours (R. 68); that although he had instructed the roundhouse to furnish the engines in a specified routine, he did not care whether switch engine No. 301 or another engine kept the trains going west (R. 69-70); and that if the men in the roundhouse substituted another for switch engine No. 301, they would not notify the witness (R. 70).

The petitioner filed a claim for compensation which came on for hearing before the Commissioner of Workmen's Compensation in Kansas City, Kansas, on March 21, 1939 (R. 31). The parties stipulated that the relation of employer and employee existed at the time of the injury and that the petitioner had met with an accidental injury arising out of, and in the course of, his employment with the respondents (R. 31). On April 27, 1939, the Commissioner granted petitioner compensation in the sum of $14.45 per week for a period of 415 weeks and in addition, not to exceed $500.00 for medical and hospital services (R. 37-38). An appeal was taken to the District Court of Wyandotte County, Kansas, which adopted the findings, conclusions and the award of the Commissioner (R. 40). The Supreme Court of Kansas reversed the judgment of the District Court on January 25, 1941, on the ground that petitioner's employment at the time of injury brought him within the Federal Act, and excluded him from the Kansas Workmen's Compensation Act; it remanded with directions to enter a judgment for the respondents (R. 73). The petitioner's motion for rehearing was denied on March 14, 1941 (R. 97). On March 19, 1941, the Supreme Court of Kansas stayed the issuance of the mandate for a period of sixty (60) days (R. 97).

## SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Kansas erred:

1. In holding and deciding that at the time of his injury the petitioner was engaged in interstate transportation or work so closely related to it as to bring him within the Federal Employers' Liability Act.

2. In holding and deciding that the Kansas Workmen's Compensation Commission had no jurisdiction over the petitioner's claim for compensation.

3. In holding and deciding that the petitioner came within the Federal Employers' Liability Act because, at the time of the injury, the switch engine had been assigned to interstate and intrastate switching.

4. In failing to hold that, even though the petitioner was engaged in interstate commerce at the time of his injury, he properly came within the Kansas Workmen's Compensation Act.

5. In reversing the decision of the District Court of Wyandotte County in favor of the petitioner.

## REASONS FOR GRANTING THE WRIT

1. In holding that the petitioner was engaged in employment subject to the Federal Employers' Liability Act, the Supreme Court of Kansas decided a Federal question of substance in a way which is in direct conflict with *Illinois Central Railroad Company* v. *Behrens*, 233 U. S. 473. In that case the injured employee was a member of the crew of a switch engine which was moving cars loaded with freight which was wholly intrastate. Upon completion of that movement, it was to have switched several other cars as a step in their transportation within and without the state. This Court held that the employee was not in interstate commerce within the meaning of the Federal Employers' Liability Act. The Court also held that the fact that the switch engine and the employee were expected, upon completion of their task, to engage in another which would be a part of interstate commerce, was immaterial under the statute, since the true test is the nature of the work being done at the time of the injury. The Supreme Court of Kansas, notwithstanding this decision, has held that an employee of a railroad who was tending a switch engine which was stationary, and

was to remain so for three or four more hours, was engaged in employment exclusively within the purview of the Federal Employers' Liability Act, because at the time of the injury the trainmaster had assigned the switch engine to the task of moving, at a later time, cars destined for both interstate and intrastate points. See also *Chicago, Burlington & Quincy Railroad* v. *Harrington,* 241 U. S. 177, 180.

2. The Supreme Court of the State of Kansas has decided a Federal question of substance as to the application of the Federal Employers' Liability Act in a way probably not in accord with the applicable decisions of this Court. The lower court purported, in accordance with *Shanks* v. *Delaware, Lackawanna & Western Railroad Company,* 239 U. S. 556, to employ the test whether the petitioner at the time of the accident was performing work connected with the operation of an instrumentality of interstate commerce or so closely related thereto as to be an essential part of it. But the court misapplied this test. Beyond question, the petitioner was not employed in interstate transportation. To begin with, the switch engine was an instrumentality of intrastate or interstate transportation only when it switched intrastate or interstate cars. At the time of the accident it was an instrumentality of neither. It was switching no cars at all. In the second place the petitioner had nothing to do with its operation; he merely kept up steam and poured in water. Nor was the petitioner, within the applicable decisions of this Court, engaged in work so closely related to interstate transportation as to be practically a part of it. He was certainly no closer to interstate transportation than was the employee who fired a locomotive engine to generate steam for heating coaches

from interstate suburban trains. *Chicago & Northwestern Railway Co.* v. *Bolle,* 284 U. S. 74. Or the employee who was injured while oiling a machine which furnished the power to hoist into a chute coal for the use of locomotive engines principally employed in the movement of interstate freight. *Chicago & Eastern Illinois Railroad Co.* v. *Commission,* 284 U. S. 296. Or the employee who was moving the main driving wheels to a pit in the roundhouse so that they could be placed under a locomotive used for interstate transportation, which was undergoing repairs in connection with a boiler wash. *New York, New Haven & Hartford Railroad* v. *Bezue,* 284 U. S. 415. Or the employee engaged in repairing an engine which had been used in interstate business and which was used shortly after the accident in interstate transportation. *Minneapolis & St. Louis Railroad Company* v. *Winters,* 242 U. S. 353. Or the member of the switching crew which was switching coal from a storage track to a coal shed where it was to be placed in bins and supplied, as needed, to locomotives in interstate and intrastate transportation. *Chicago, Burlington & Quincy Railroad Co.* v. *Harrington,* 241 U. S. 177. In all of these cases the employee was one or more steps removed from interstate transportation, and he was held not subject to the Federal Act. The petitioner was just as remote from interstate transportation.

3. The decision of the Supreme Court of the State of Kansas upon a Federal question of substance is in direct conflict with *White* v. *Lehigh Valley R. Co.,* 251 App. Div. 507, N. Y. Sup. Ct., App. Div., 3rd Dept., app. denied, 276 N. Y. 690, which is brief enough for quotation:

> "Appeal by the Lehigh Valley Railroad Company from an award of death benefits. The em-

ployee, while repairing a locomotive on June 20, 1935, received injuries which caused his death. *The locomotive, each day from 3 p. m. to 7 a. m., was used in the East Buffalo yards of employer to move and place inter and intra state cars.* On the day of the accident, it was taken to the roundhouse about 7:15 in the morning. The fire was extinguished and the water drained, repairs were made to the tank, air pump, and to certain rods and bolts, and leaky flues in the boiler were calked. It returned to its work as a yard engine at 3 o'clock the same afternoon. Decedent, at the time of his injury, was not employed in interstate commerce within the purview of the Federal Employers' Liability Act, 45 U. S. C. A. Secs. 51-59." (Italics supplied.)

This case was cited in the petitioner's brief before the court below, and again called to its attention on rehearing (R. 95-96), but was completely disregarded by it.

4. This Court should reconsider its decisions and formulate a test for the application of the Federal Employers' Liability Act which will not operate, as it has countless times in the past, to deprive injured railroad employees of compensation or to grant them compensation only after a long struggle with rich and powerful railroads. The petitioner's plight vividly illustrates the unjust operation of the deceptively simple and exclusive test laid down in former decisions. More than three years have passed since he was injured in the employment of respondents, and he has yet to receive any compensation whatever.

An indefinite and exclusive concept of employment under the Federal Act puts the injured railroad worker

or his survivors to a gambler's choice between State and Federal Acts. The railroads merely stand back until the perilous choice is made, and then, pursuant to the time-worn conventions of the adversary system, file a defense to the effect that the employee came under the other act. The uneven contest goes on for years, while the worker or his family spends years alternating between hope and no hope of recovery, at the end of which, as in this case, an appellate court may announce that the worker selected the wrong statute. By that time it may be too late for action under the other act. And the worker learns by bitter experience that one remedy plus another equals, not two, but none.

Had the petitioner proceeded under the Federal Act, the books are filled with decisions from which the respondents could have argued that he should have proceeded under the State Act. Nor does the 1939 amendment to Section 1 of the Act,[1] which was enacted after the petitioner's cause of action accrued, eliminate the worker's harsh dilemma. The enlarged definition of employment within the Act still leaves an area of doubt in which the worker may be remediless, or with a remedy only after years of litigation—in effect a denial of a remedy. Indeed, the new scope of the Federal Act, if given exclusive application, foreshadows a repetition by this Court of the tiresome and uninspiring task of pricking out by a process of inclusion and exclusion from a kaleidoscope of varying fact situations what duties "shall be the furtherance of interstate or

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[1] "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce * * *." 53 Stat. 1404, 45 U. S. C. A. Sec. 51.

foreign commerce" or shall "in any way directly or closely and substantially, affect such commerce". This Court should recognize overlapping State and Federal jurisdiction in doubtful cases, and permit the worker a choice of remedies. It should rule that he must not be denied relief because he proceeded under the State Act instead of the Federal Statute, or vice versa. Such a rule would prefer experience to logic in law.

Continuing the indefinite, exclusive application of the Federal Employers' Liability Act will perpetuate the "form of social injustice" recognized by President Theodore Roosevelt when, in urging the enactment of more advanced legislation, he stated to the Congress, "The practice of putting the entire burden of loss to life or limb upon the victim or the victim's family is a form of social injustice in which the United States stands in unenviable prominence." See 42 Cong. Rec. 73, 1907. As has been pointed out by eminent commentators, the Supreme Court's exclusive test is an unworkable concept.

> "Ever since the passage of the Federal Employers' Liability Act, the chase of this elusive issue [intrastate or interstate concept of transportation] has been a game of blind man's buff for bench and bar, as though life and limb and the rational conduct of railroad enterprise were not at stake; or, to put it in Judge Learned Hand's language of ratiocination, 'the cases are full of casuistry'."[2]

These remarks are equally pertinent to the new definition of employment within the Act. The question re-

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[2] See Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1931* (1932) 46 Harv. L. Rev. 226, 245. See also Schoene and Watson, *Workmen's Compensation on Interstate Railways* (1934) 47 Harv. L. Rev. 389, 394, 398.

mains one of vital importance to a large number of railroad workers in America. Their dilemma can be avoided only by recognizing that State and Federal statutes can overlap in doubtful cases.

5. Even if the petitioner was engaged in interstate transportation or work very closely related to it, his sole remedy is under the State Compensation Act. He did not allege or prove fault upon the part of the respondents, and the Federal Employers' Liability Act provides relief only for injuries "resulting in whole or in part from the negligence of any of the officers, agents or employees" of interstate railroads. Nevertheless, the State Court, under the compulsion of *New York Central Railroad Co.* v. *Winfield,* 244 U. S. 147, held that the Federal Employers' Liability Act regulates the liability of interstate carriers to employees in interstate commerce, both inclusively and exclusively, and precludes State relief [3] for injuries without fault in this field, although the Federal Act provides no remedy (R. 78-79). Thus, the Supreme Court of Kansas applied the Federal Employers' Liability Act even though no fault was alleged or proved. This holding raises a very important question of statutory construction, deemed settled by the *Winfield* case, which should be reconsidered by this Court. In that case, despite a powerful and cogent dissent by Justices Brandeis and Clarke, a majority of the Court held that the Federal

[3] The Kansas legislature clearly intended to exert its legislative power in its fullest extent and undoubtedly enacted a remedy for railroad employees injured in interstate commerce in cases not controlled by the Federal Employers' Liability Act. Thus, Sec. 44-506, Kans. Gen. Stat. (1935), provides that the State Compensation Act excludes only those businesses or employments "which, according to law, are so engaged in interstate commerce as to be not subject to the legislative power of the state * * *."

Act prohibited States from including within the protection of their workmen's compensation laws employees who, without fault on the railroad's part, are injured or killed while engaged in interstate commerce, although the Federal Act itself offered them no protection. This Court should overrule *New York Central Railroad Co.* v. *Winfield,* and adopt the unimpeachable view taken by Justices Brandeis and Clarke:

> "The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents. I find no justification for imputing to Congress the will to deny to a large class of persons engaged in a necessarily hazardous occupation and otherwise unprovided for the protection afforded by beneficient statutes enacted in the long-deferred performance of an insistent duty and in a field peculiarly appropriate for state action." (pp. 169-170)

The record contains no proof of negligence on the part of the respondents (R. 37). The petitioner's whole case is based upon liability without fault (R. 6-7). The Federal Act provides no remedy for cases such as the one presented by this record. Thousands of railroad employees, hurt or injured without fault while engaged in interstate transportation, have been compelled to bear the entire burden of inevitable industrial accidents. This condition was created by a narrow, legalistic and erroneous construction of the Federal Employers' Liability Act by a majority of this Court in the *Winfield* case. Railroad workers should be protected from this no-man's land into which Congress has not entered and from which the States have been barred by judicial decision.

This Court should overrule *New York Central Railroad Co.* v. *Winfield* and should hold that the petitioner, even if in interstate commerce, is within the jurisdiction of the Kansas Workmen's Compensation Commission.

## CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES A. HORSKY,
DANIEL L. BRENNER,
*Attorneys for Petitioner.*